

87-005 TSE

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

State Employment Relations Board,

Complainant,

and

Wilmington Education Association,

Intervenor,

and

Ohio Association of Public School Employees,

Intervenor,

and

Wilmington City School District Board of Education,

Respondent.

CASE NUMBERS: 85-UR-11-2395  
85-UR-11-2432

ORDER  
(Opinion attached.)

Before Chairman Day and Vice Chairman Sheehan; April 7, 1987.

On November 16, 1984, the Ohio Association of Public School Employees (OAPSE) filed an unfair labor practice charge against the Wilmington City School District Board of Education (Respondent). On November 23, 1984, the Wilmington Education Association (WEA) filed an unfair labor practice charge against the Respondent. Both charges alleged that Respondent had refused to bargain with OAPSE and WEA over the purchase of liability insurance, and that Respondent had purchased the liability insurance without first negotiating over this subject with OAPSE and WEA.

Pursuant to Ohio Revised Code Section 4117.12, the Board conducted an investigation and in a directive dated August 8, 1985, dismissed both charges for lack of probable cause to believe that unfair labor practices had been committed.

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On November 27, 1985, WEA filed a motion for reconsideration. The Board granted the motion, vacated its previous dismissal order of WEA's charge, and found probable cause to believe that an unfair labor practice had been committed. On December 19, 1985, the Board *sua sponte* vacated its dismissal of OAPSE's charge and found probable cause to believe that an unfair labor practice had been committed. Subsequently, a complaint was issued with regard to both charges alleging violations of Ohio Revised Code Section 4117.11(A)(1) and (A)(5) by the Respondent. The matter was heard by a Board hearing officer.

On November 1986, after reviewing the record, the hearing officer's recommendations, the exceptions, and responses, the Board issued a directive remanding the case to the hearing officer to obtain additional evidence on four specific issues. Subsequently, the hearing officer issued a procedural order with the same recommendations as in the original hearing officer's proposed order, including the additional stipulations of fact submitted by the parties pursuant to the Board's remand directive. The Respondent, the Complainant, and WEA filed supplemental memoranda. The Board has reviewed the record, the hearing officer's recommendations, the exceptions, responses, additional stipulations and supplemental memoranda.

For the reasons set forth in the attached opinion, incorporated by reference, the Board adopts the stipulations of fact and additional stipulations of fact, modifies the hearing officer's conclusions of law numbers 4 and 5 to read:

- "4. The issue of purchasing liability insurance for Respondent's employees is not a mandatory subject of bargaining, but bargaining on the effects on working conditions is mandatory.
- "5. Respondent's refusal to bargain collectively with OAPSE or with WEA on the effects on working conditions constitutes interference with and restraint of employees in the exercise of their rights guaranteed in Chapter 4117 of the Ohio Revised Code, and a refusal to bargain collectively in violation of Ohio Revised Code Section 4117.11(A)(1) and (A)(5)."

and adopts the hearing officer's conclusions of law as modified.

The Respondent is ordered to:

a. Cease and desist from:

- (1) Interfering with and restraining of employees in the exercise of rights guaranteed in Chapter 4117 of the Ohio Revised Code, and refusing to bargain collectively with the exclusive representative, and from otherwise violating O.R.C. Sections 4117.11(A)(1) and (5).

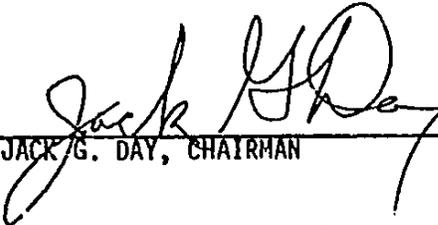
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b. Take the following affirmative actions:

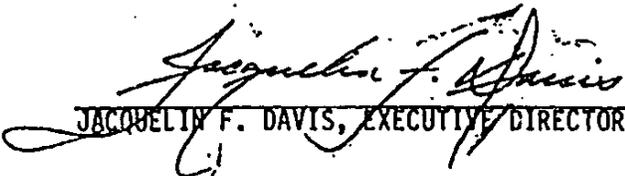
- (1) Post for sixty (60) days in all Wilmington City School District buildings where the affected employees work the Notice to Employees furnished by the Board stating that the Wilmington Board of Education shall cease and desist from the actions set forth in Paragraph (a) and shall take the following affirmative actions set forth in Paragraph (b).
- (2) Immediately engage in collective bargaining with the exclusive representatives of the affected employees regarding the effects on working conditions of the purchase of liability insurance for the employees in the bargaining units represented by WEA and OAPSE.

It is so ordered.

DAY, Chairman, and SHEEHAN, Vice Chairman, concur.

  
 JACK G. DAY, CHAIRMAN

I certify that this document was filed and a copy served upon each party on this 9<sup>th</sup> day of April, 1987.

  
 JACQUELIN F. DAVIS, EXECUTIVE DIRECTOR

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# NOTICE TO EMPLOYEES

## FROM THE STATE EMPLOYMENT RELATIONS BOARD

POSTED PURSUANT TO AN ORDER OF THE  
STATE EMPLOYMENT RELATIONS BOARD  
AN AGENCY OF THE STATE OF OHIO

After a hearing in which all parties had an opportunity to present evidence, the State Employment Relations Board has determined that we have violated the law and has ordered us to post this Notice. We intend to carry out the order of the Board and abide by the following:

a. HE WILL CEASE AND DESIST FROM:

Interfering with and restraining of employees in the exercise of rights guaranteed in Chapter 4117 of the Ohio Revised Code, and refusing to bargain collectively with the exclusive representative, and from otherwise violating O.R.C. Sections 4117.11(A)(1) and (5).

HE WILL NOT in any like or related matter, interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them under Chapter 4117 of the Revised Code.

b. HE WILL TAKE THE FOLLOWING AFFIRMATIVE ACTION:

- (1) Post for sixty (60) days in all Wilmington City School District buildings where the affected employees work the Notice to Employees furnished by the Board stating that the Wilmington Board of Education shall cease and desist from the actions set forth in Paragraph (a) and shall take the following affirmative actions set forth in Paragraph (b).
- (2) Immediately engage in collective bargaining with the exclusive representative of the affected employees regarding the effects on working conditions of the purchase of liability insurance for the employees in the bargaining units represented by the NEA and OAPSE.

WILMINGTON CITY SCHOOL DISTRICT  
BOARD OF EDUCATION  
85-UR-11-2395 and 85-UR-11-2432

DATE

BY

TITLE

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED**

ERB 2012 This notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board.

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STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of  
State Employment Relations Board,  
Complainant,  
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Wilmington Education Association,  
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Ohio Association of Public School Employees,  
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Wilmington City School District Board of Education,  
Respondent.

CASE NUMBERS: 85-UR-11-2395  
85-UR-11-2432

OPINION

Day, Chairman:

The charges in these two cases turned on the same issues - whether the Wilmington City School District Board of Education (Respondent or Board) refused to bargain over the purchase of liability insurance, and whether it purchased liability insurance without first negotiating this subject with the intervenors, Wilmington Education Association (WEA) and Ohio Association of Public School Employees (OAPSE).

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Ultimately, probable cause was found on both charges, a single complaint issued, and the cases were assigned to the same hearing officer for hearing and determination.<sup>1</sup>

Subsumed under the issues raised by the charges and their processing are three questions. These questions and their answers are:

1. Whether SERB has jurisdiction in SERB Case No. 85-UR-11-2395 (the Unfair Labor Practice Charge filed by the WEA)?

The question is answered "Yes."

2. Whether the purchase of liability insurance for employees represented by the WEA and OAPSE is a mandatory subject of bargaining?

The question is answered "No," but bargaining over the effects on working conditions is mandatory.

3. If the purchase of liability insurance is a mandatory subject of bargaining, is Respondent's refusal to bargain over this issue with the WEA and OAPSE prior to its purchase of insurance a violation of O.R.C. Sections 4117.11(A)(1) and (5)?

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<sup>1</sup>After the Hearing Officer's Proposed Order was issued the State Employment Relations Board (SERB) remanded the cases for taking of further evidence on four issues:

- "1. The coverage of the Respondent insurance and its effects, if any, on working conditions.
- "2. The coverage of the Union insurance for union or unit members.
- "3. The effect of Ohio Revised Code Section 2744, especially Section 2744.03(6)(c), on either or both insurance coverages.
- "4. The relationship of each of the foregoing to each other."  
(See SERB Order, November 26, 1986, page 1).

The remand resulted in further stipulations of fact but no change in the Hearing Officer's Proposed Order.

The question is answered a qualified "Yes," despite the fact that the purchase of liability insurance is not a mandated subject of bargaining (See answer to question 2).

The reasons for the answers to the questions are adduced below.

The admissions and stipulations of the parties, without further findings by the Hearing Officer, are adopted.<sup>2</sup> The Hearing Officer's conclusions of law and recommendations are modified and, as modified, adopted.

I

The facts essential to the understanding and disposition of the issues are these:

1) WEA filed an unfair labor practice charge in Case 85-UR-11-2395. The charge was dismissed. WEA moved for reconsideration. The motion was granted and on reconsideration probable cause was found without additional investigation.<sup>3</sup>

2) The respondent was immune from liability<sup>4</sup> for many years before April 1, 1984. Nevertheless, the respondent had purchased motor vehicle liability insurance during those years covering all the employees in the district, including those represented for collective bargaining purposes by WEA and OAPSE respectively.<sup>5</sup>

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<sup>2</sup>See Hearing Officer's Proposed Order (HOPO) pp. 4-7 and additional stipulations of the parties attached to the Hearing Officer's Procedural Order (Supp. HOPO) after remand.

<sup>3</sup>HOPO Stipulations of Fact (SF) Nos. 4, 7, and 8.

<sup>4</sup>Id. SF No. 11.

<sup>5</sup>Id. SF Nos. 11 and 12.

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- 3) Neither WEA nor OAPSE attempted to negotiate any aspect of the liability insurance or its coverage before April 1, 1984, although both had annual opportunities from the time of the first contracts with the Respondent<sup>6</sup> and were aware that the Respondents were purchasing the insurance.<sup>7</sup> WEA and OAPSE made their first effort at negotiating any aspect of liability insurance by letters in September and October of 1984.<sup>8</sup>
- 4) After the Carbone<sup>9</sup> decision abolishing sovereign immunity for school boards, the Respondent purchased comprehensive liability insurance covering itself and all its employees. This was the first purchase of liability insurance by the Respondent after the effective date of Chapter 4117 of the Ohio Revised Code.<sup>10</sup>
- 5) Respondent authorized the purchase and purchased the liability insurance in issue without notice to WEA and OAPSE. Liability insurance was not made an issue by any party during the collective bargaining negotiations in progress at the time of Respondent's authorization for the purchase.<sup>11</sup>

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<sup>6</sup>Id. SF No. 14.

<sup>7</sup>Id. SF No. 13.

<sup>8</sup>Id. SF Nos. 14, 19, and 20.

<sup>9</sup>Carbone v. Overfield (1983) 6 Ohio 3rd. 212, 214.

<sup>10</sup>HOPPO, supra, SF No. 15.

<sup>11</sup>Id. SF No. 15.

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6) Respondent refused to negotiate on the issue of purchasing liability insurance<sup>12</sup> and continues to refuse.<sup>13</sup>

II

SERB, having first dismissed the charge in Case No. 85-UR-11-2935,<sup>14</sup> found probable cause on motion for reconsideration.

The principle governing such actions by an administrative tribunal was considered, approved, and implemented by the Supreme Court of Ohio in State, ex rel. Maxson v. Board of Commissioners:

"That rule, well settled by numerous adjudications, is to the effect that the action of such bodies respecting legislative or administrative matters is not always conclusive and beyond recall, but that they are possessed of inherent power to reconsider their action in matters of that nature, and adopt if need be the opposite course in all cases where no vested right of others has intervened, the power to thus act being a continuing power."

"In National Tube Co. v. Ayres, Aud., 152 Ohio St., 255, 262, 40 O.O., 312, 315, 89 N.E. (2d.), 129, the authority of the Board of Tax Appeals to entertain a motion for rehearing and set aside its decision was questioned. It is stated in the opinion that 'it has been a long established precedent in this state that boards such as the Board of Tax Appeals have control over their decisions until the actual institution of an appeal or the expiration of the time for appeal.'<sup>15</sup>

<sup>12</sup>Id. SF Nos. 19, 20-23.

<sup>13</sup>Id. SF No. 24 and Respondent's conclusions that the insurance question is not a subject of mandatory bargaining and has no effect on wages, hours, and working conditions of its employees in Brief of Respondent on Remand, pp. 10-11.

<sup>14</sup>Case No. 85-UR-11-2432 was reconsidered sua sponte by SERB and probable cause found. HOPO SF No. 7. It is unnecessary to defend SERB's sua sponte action. It has not been challenged. If it were, the same considerations assessed in disposing of the motion for reconsideration would be applicable.

<sup>15</sup>(1958) 167 Ohio St. 458, 460; see also State, ex rel. Prayner v. Industrial Commission (1965) 2 Ohio St. 2d. 120.

It is clear that the Maxson principle reaches and authorizes the action taken by SERB on the motion for reconsideration. SERB had jurisdiction to act as it did.

III

The last two of the three questions are subject to the same disposition and for the same reasons. Therefore, they are addressed together.

The Carbone case, decided in August of 1983, stripped the Respondent of sovereign immunity rendering it vulnerable to damages for injuries attributable to the negligence of its employees in the course of their employment. Roughly two years later, the legislature passed the Political Subdivision Tort Liability Act, Chapter 2744 of the Ohio Revised Code. Subsection R.C. 2744.07 requires political subdivisions to provide for the defense of its employees against employment related tort claims<sup>16</sup> and to

<sup>16</sup>R.C. Section 2744.07 [Defense and indemnification of employees; authority to settle.]:

"(A) (1) Except as otherwise provided in this division, a political subdivision shall provide for the defense of an employee, in any state or federal court, in any civil action or proceeding to recover damages for injury, death, or loss to persons or property allegedly caused by an act or omission of the employee in connection with a governmental or proprietary function if the act or omission occurred or is alleged to have occurred while the employee was acting in good faith and not manifestly outside the scope of his employment or official responsibilities. Amounts expended by a political subdivision in the defense of its employees shall be from funds appropriated for this purpose or from proceeds of insurance. The duty to provide for the defense of an employee specified in this division does not apply in a civil action or proceeding that is commenced by or on behalf of a political subdivision.

"(2) Except as otherwise provided in this division, a political subdivision shall indemnify and hold harmless an employee in the amount of any judgment, other than a judgment for punitive or exemplary damages, that is obtained against the employee in a state or federal court or as a result of a law of a foreign jurisdiction and that is for damages for injury, death, or loss to persons or property caused by an act or omission in connection with a governmental or proprietary function, if at the time of the act or omission the employee was acting in good faith and within the scope of his employment or official responsibilities."

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indemnify its employees and hold them harmless for damages resulting from such claims.<sup>17</sup> Both duties are subject to specified circumscriptions not relevant to the issues in this case.

R.C. 2744.08 (set out in the margin at footnote 17) establishes a measure of discretion for political subdivisions. The obligation imposed by R.C. 2744.07 may be met either by the purchase of private insurance or by a self-insurance program but it cannot be avoided. The alternative imposed by law creates a choice but not a right to decline to make it.

The statutory origin of the alternative obligation puts the insurance issue in the permissive bargaining area but the matter does not end there.

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<sup>17</sup> R.C. 2744.08 [Liability insurance; self-insurance programs; waiver of immunity.]:

"(A) (1) A political subdivision may use public funds to secure insurance with respect to its and its employees' potential liability in damages in civil actions for injury, death, or loss to persons or property allegedly caused by an act or omission of the political subdivision or any of its employees in connection with a governmental or proprietary function. The insurance may be at the limits, for the circumstances, and subject to the terms and conditions, that are determined by the political subdivision in its discretion.

"The insurance may be for the period of time that is set forth in specifications for competitive bids or, when competitive bidding is not required, for the period of time that is mutually agreed upon by the political subdivision and insurance company. The period of time does not have to be, but can be, limited to the fiscal cycle under which the political subdivision is funded and operates.

"(2) (a) Regardless of whether a political subdivision procures a policy or policies of liability insurance pursuant to division (A)(1) of this section or otherwise, the political subdivision may establish and maintain a self-insurance program relative to its and its employees' potential liability in damages in civil actions for injury, death, or loss to persons or property allegedly caused by an act or omission of the political subdivision or any of its employees in connection with a governmental or proprietary function. If it so chooses, the political subdivision may contract with any person, other political subdivision, or regional council of governments for purposes of the administration of such a program."

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If the choice "affects wages, hours, [and] terms and conditions of employment,"<sup>18</sup> then management has a duty to bargain on the effects, if any, of the liability program adopted.<sup>19</sup>

That liability insurance protecting employees is a "term and condition of employment" and, therefore, a fortiori "affects" terms and conditions is patent. An employee does not escape liability by virtue of agent status in a principal and agent relationship. And, should a victim choose to target the agent, the latter may have damage exposure despite the indemnity features of R.C. 4117.07(A)(2) if (1) the insurance coverage and/or school district financial condition is not enough to cover the judgment, or (2) employee acts or omissions take the employee outside the immunities conferred by R.C. 2744.03(A)(6).<sup>20</sup> Thus, the amount and condition of financial coverage affects a condition of employment. Moreover, there are generalizations within the exceptions to statutory protection which are susceptible to refinement in bargaining. For example, punitive and exemplary damages do not require employer indemnification. Nor is indemnification necessary if the employee whose act gave rise to the claim was acting with less than "good faith" or outside "the scope of his employment or official responsibilities." The meaning and scope of such terms as "punitive," "exemplary," "good faith," "scope of employment," and "official responsibilities" are not defined in Chapter 2744. In addition, R.C. 2744.03(A)(6) sets out exceptions to employee immunity. The subsection

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<sup>18</sup>R.C. 4117.08(C).

<sup>19</sup>Id.

<sup>20</sup>See fn. 21 infra.

abounds in undefined terms whose perimeters may acquire precision through bargaining.<sup>21</sup> Since the exact meanings will shape the effects of liability protection and, therefore, the conditions of employment, the effects are bargainable.<sup>22</sup>

IV

The admissions and stipulations of fact are adopted.<sup>23</sup> The Hearing Officer's Conclusions of Law numbers 4 and 5 are modified to conform to the conclusions of this opinion. This opinion is incorporated in the accompanying order by reference.

The Hearing Officer's Recommendations are modified to reflect the changes in Conclusions of Law numbers 4 and 5. Conclusions of Law numbers 4 and 5, as modified, are approved.

Sheehan, Vice Chairman, concurs.

<sup>21</sup>R.C. 2744(A):

"(6) The employee is immune from liability unless one of the following applies:  
(a) His acts or omissions were manifestly outside the scope of his employment or official responsibilities;  
(b) His acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;  
(c) Liability is expressly imposed upon the employee by a section of the Revised Code."

<sup>22</sup>Statutory imperatives apart, liability insurance may be deemed a form of compensation. As such, some courts have held it may be a mandatory subject of bargaining. See p.e. Town of Haverstraw v. Newman (1980) 427 NYS 2d. 880, 882.

<sup>23</sup>The admissions and stipulations are so extensive that the Hearing Officer found it unnecessary to make further findings of fact. See HOPO No. 7.